DOCUMENT RESUME

ED 188 049 CG 014 443

TITLE Prosecutor's Responsibility in Spouse Abuse Cases.
INSTITUTION National District Attorneys Association, Chicago, Ill.
SPONS AGENCY Law Enforcement Assistance Administration (Dept. of Justice), Washington, D.C.
NOTE 56p.
AVAILABLE FROM Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (Stock No. 027-000-00900-0)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS *Battered Women; Court Litigation; Criminal Law; *Family Problems; Justice; *Lawyers; Legal Problems; *Legal Responsibility; Marital Instability; *Spouses; State of the Art Reviews; *Violence
IDENTIFIERS *Victims

ABSTRACT

A conference on the role of the prosecutor in spouse assault cases, organized by the National District Attorneys Association (NDAA) and the Center for Women Policy Studies (CWPS) was held in Memphis, Tennessee, September 25-28, 1978. The objectives of this conference are described in terms of the need to reach consensus on how cases should be handled by prosecutors and the way in which information can be exchanged among prosecutors representing the 17 cities where LEAA-funded family violence projects exist. Issues addressed included: (1) the nature and extent of family violence, particularly spouse abuse; (2) the appropriateness of criminal prosecution; (3) criteria for determining prosecution; (3) measures to assure victim cooperation; (4) ways to overcome proof and evidentiary problems; (5) effective dispositions; and (6) effective alternatives to prosecution. A list of conference participants and an annotated bibliography of selected readings are also provided. (Author/HLM)

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Prosecutor's Responsibility in Spouse Abuse Cases

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This project is supported under Grant Number 77 DF-99-0035 awarded by the Law Enforcement Assistance Administration, United States Department of Justice. Points of View or opinions stated in this publication are those of the Commission on Victim Witness Assistance of the National District Attorneys Association and do not necessarily represent the official position of the United States Department of Justice.

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Foreword

Family violence, a problem as old as Cain and Abel, is at long last being looked upon as a matter which need not be settled exclusively within the family circle.

A number of leading individuals have seen fit to speak out recently in an effort to find a solution to this national problem. The recent conference in Memphis is an outstanding example of this effort, and the National District Attorneys Association is proud to have participated in it. We heartily encourage the participants to continue their efforts to control and treat this problem, which strikes in so many ways at the roots of our society's elemental structure, the family. We encourage readers of this Victim Advocate to work, by any means at their command, to alleviate this problem in their communities.

Let me say again that the National District Attorneys Association is pleased to have taken part in this important project.

Patrick F. Healy
Executive Director
National District Attorneys Association

MAY 1 1980

SEVEN RECENT REASONS
WHY FAMILY VIOLENCE CASES
NEED TO BE RE-EVALUATED - NOW

Marlene Roan Eagle, a seven-months-pregnant American Indian in South Dakota, stabbed her husband through the heart after he came at her with a broken broomstick. It was established that he had beaten her on several occasions and Roan Eagle was acquitted of murder on the grounds that she acted in self-defense.

Sharon McNearney was found innocent of murdering her husband. The Marquette, Michigan housewife fired a shotgun at him as he walked through the front door. Police described her as a battered housewife who had long been abused. Marquette County Circuit Court Judge John E. McDonald said the prosecution failed to prove she had not acted in self-defense.

Evelyn Ware was found not guilty of murdering her husband after pleading self-defense in Orange County, California Superior Court. Ware shot him five times. Evidence of past beatings was used as part of her defense.

In Chicago, Juan Maldonado was shot and killed by his wife, Gloria after he beat his eight-year-old son with a shoe. The State's Attorney's office ruled there was "insufficient evidence" to warrant her prosecution.

A jury in the rural town of Bellingham, Washington acquitted Janice Hornbuckle of first-degree murder. One night, after her husband beat her and threatened her at knife-point, Hornbuckle grabbed a shotgun from her teenage son, a high school student body president, and shot her husband. She had previously sought police protection on several occasions.

Jennifer Patri, a Sunday school teacher and PTA president, claimed self-defense when she went to trial in Waupaca, Wisconsin. For years, she was beaten and sexually abused by her auto-repairman husband. He had also molested their twelve-year-old daughter, and at the time of the killing she had started divorce proceedings. When her husband entered their house one day, Patri shot him, buried his body in an adjacent smokehouse, and set her house on fire, according to her lawyer, Alan Eisenberg.

Roxanne Gay, widow of Philadelphia Eagles defensive lineman Blenda Gay was charged with stabbing her 6-foot-5, 255-pound husband to death in December, 1976. Records show she repeatedly called police for protection from beatings by him, but, the officers merely told him to walk around the block to cool off -- and on one occasion they ended up talking football with him.

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Acts of family violence have been occuring since the family unit began. It hasn't been until recently, however, that our newspapers across the country have taken notice and spoken out. The general feeling has been that "this is a family problem that should be settled by the family."

Recent crime statistics indicate 31% of homicides occur in the family, and of these, approximately half are between spouses. The FBI has stated that 20% of the police officers killed in the line of duty died while answering family disturbance calls. Many feel these figures are not accurately reflecting the real number of situations. Literally thousands of spousal abuse cases go unreported.

The NDAA Commission on Victim Witness Assistance has recognized the need for prosecutors to re-evaluate this type of case before it turns to homicide. We feel strongly about the need to have the prosecutor evaluate and use the community services available to the office in handling these cases.

It's happening in your community.

We hope this final issue of the Victim Advocate will assist you in recognizing the areas to be considered, and urge you to become aware of the needs in handling such sensitive cases.

The Commission commends Marge Gates, the Center for Women Policy Studies, and Jeannie Niedermeyer, Law Enforcement Assistance Administration, for their foresight in helping to bring these issues into the open. We are very pleased to be a part of the initial groundwork in giving the necessary re-evaluation to this problem facing each prosecutor.

If we can assist you with further information, please don't hesitate to contact us.

Nancy Randall Freeman
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October 25, 1978

Dear Reader:

The role of the prosecutor in spouse assault cases was the subject of a conference organized by the National District Attorneys Association (NDAA) and the Center for Women Policy Studies (CWPS) in Memphis, Tennessee, September 25-28, 1978. The conference originated out of the need expressed by prosecutors for assistance in developing comprehensive strategies to respond to spouse assault cases. Funds for the conference were made available by the NDAA Victim Assistance Commission through a grant from the LEAA Special Program Division in support of its Victim/Witness and Family Violence Programs.

The primary objective of the conference was to reach a consensus as to how these cases should be managed by prosecutors. The Center for Women Policy Studies made up a tentative agenda of issues to be discussed at the conference and the participants were given an opportunity to refine the agenda, discuss the issues and make suggestions as to various resolutions. The deliberations and decisions of the participatory group are synthesized in this NDAA publication and will be distributed by the NDAA and the CWPS Clearinghouse on Family Violence.

The second objective of the meeting was to bring about an exchange of information among prosecutors from the 17 cities where LEAA-funded projects are dealing with family violence. An approximately equal number of other program managers, evaluators, mediators, legal services attorneys and social scientists were also invited to broaden the perspective and widen the range of expertise. A list of the participants follows.

The report of the conference was written by Terry Fromson, an Attorney with Community Services, Inc., in Philadelphia, who acted as a consultant to CWPS for this purpose. The problem statement which prefaces it was authored by Diane Hamlin, our Clearinghouse Director.

Sincerely,

Margaret Gates

Margaret Gates
Project Director

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TABLE OF CONTENTS

NATURE AND EXTENT OF SPOUSE ABUSE

Introduction 1
What is the nature of spouse assault? . . . 3
What is the extent of the problem? 4
Who are the victims of spouse abuse? 6
Why do battered women stay? 8
Who are the abusers? 10
Role of alcohol in abusive behavior 11
What methods of intervention are effective in stopping spouse assault? 13

RESPONSIBILITIES OF THE PROSECUTOR IN SPOUSE ASSAULT CASES

Introduction
How appropriate is criminal prosecution in spouse assault cases? 1
How to decide which cases to prosecute . . . 4
How to assure victim cooperation 10
How to overcome proof and evidentiary problems 12
What effective dispositions are available upon prosecution? 13
What effective alternatives to prosecution are available? 15
Conclusion 23

THE NATURE AND EXTENT OF SPOUSE ASSAULT

Diane Hamlin
Center for Women Policy Studies
Clearinghouse Director

INTRODUCTION

Violence in the family is emerging as a social crisis of tremendous dimensions. Assault between spouses (a term which will be used here to include cohabiting, sexual partners who are not married) is a part of this problem which recently has been brought to attention by the women's movement. While as many men are killed by their wives as women by their husbands, long-term physical abuse between spouses is almost always perpetrated by the man. For that reason, the victim will be referred to in this paper as female. Similarly, the problem has come to be known as wife-beating.

This phenomenon is attributed in large part to the way men and women are socialized to behave. Persons who are involved in such violence over time, and those other members of society who see this behavior as normal, often accept as desirable the gender-based stereotypes of the dominant, aggressive male and the passive, submissive female.

The same attitudes which give rise to spouse assault have prevented social systems from intervening in it. Police, prosecutors, judges and juries, along with physicians, social workers and other helping professions have been accused of ignoring the plight of battered women. Indeed a recent study noted that 56 of the 60 battered women studied were

identified from a group presenting symptoms of physical illness only because a physician specifically asked whether they had been beaten.[1]

The conferees in Memphis were representative of a growing number of persons associated with the justice system who want to improve their response to cases of spouse assaults. It was foreseen that the efforts of these highly motivated and skilled professionals would be hampered by the dearth of reliable information concerning both the nature and extent of spouse assault and ways in which to intervene successfully in a violent relationship. Knowledge in this area is extremely limited and sometimes overpowered by myths and unsupported assumptions.

For this reason, Dr. Murray Straus of the University of New Hampshire, a sociologist expert in this field, was invited to explain to the participants what his research has disclosed about "spouse abuse," a term which includes physical acts such as slaps and shoves falling short of the level of violence which ordinarily shows up in the justice system. The following questions and answers incorporate much of that session in Memphis and include other research findings as well.

What is the nature of spouse assault? Spouse assault is rarely an isolated violent episode, but more often follows a pattern in which the attacks increase in both severity and frequency if they go unchecked. In such situations, spouse assault cases too often result in homicides. A Kansas City police study found that in 85% of the homicide or aggravated assault cases seen from 1972-73, the police had been called to the home once before. In almost 50% of those cases, they had previously been called five times or more.[2] In 1975, FBI Crime Reports recorded 20,510 murders in the United States. About two-thirds of these killings were committed by people who were relatives or friends of the victim. One spouse killing another accounted for over half of the family homicides.[3]

The problem of spouse assault is exacerbated by its familial context. Society is reluctant to acknowledge the existence of violence in the family because its image of the family as a haven of love and nuturrance is so much more desirable. Society also regards the man as the head of his household with legitimate power over the woman and children he supports. While it is unacceptable behavior to hit a stranger one encounters on the street, some people deem striking a family member appropriate when it is done "for the good" of the person punished. This attitude has resulted in the marriage license being viewed as "a hitting license." Furthermore, public policy discourages governmental incursions into

the privacy of the home as is reflected in the saying, "a man's home is his castle." The famous Kitty Genovese murder case is emblematic of this differing standard of acceptability for violent behavior. When quizzed about their lack of response to her pleas for help, many of the witnesses to the homicide justified their non-interference by claiming they thought the assailant was the victim's husband.[4]

What is the extent of the problem? A recent study of a nationally representative sample of 2,143 couples found the following:

> for the twelve month period preceding the interview, 3.8 percent of the respondents reported one or more physical attacks which fall under the operational definition of wife-beating. Applying this incidence rate to the approximately 47 million couples in the United States, means that in any one year approximately 1.8 million wives are being beaten by their husbands.[5]

In addition, 28% of the couples surveyed experienced at least one violent episode during their relationship. Murray Straus, one of the researchers, considers these statistics as underestimates because of the self-reporting nature of the survey. He cites failure of memory and reluctance to admit violent acts as some of the major reasons for skepticism, and concludes "that the true incidence rate is probably closer to 50 or 60 percent of all couples than it is to the 28% who were willing to describe violent acts in a mass interview survey."[6]

A researcher investigating divorce actions similarly found that 37% of wives initiating divorce actions in the study cited physical abuse as one of their complaints.[7]

Local statistics also bear out the finding that spouse abuse is widespread. For instance, in 1973, 14,671 cases of wife beating were reported in New York State -- three times the number of reported rapes. In Atlanta, Georgia, 60% of all calls received on the police night shift are reported domestic disputes. At Boston City Hospital, approximately 70% of the assault victims received in the emergency room are women who have been attacked in the home. The police department in St. Paul, Minnesota, makes written reports on approximately 100 wife beating episodes each week, and this figure does not include police responses to domestic incidences in which the woman decides not to press charges.[8] In Wilbraham, Massachusetts, the staff of Heart House, a shelter, reported that during August 1978, 117 women and children came to them; during the first week of October 1978 approximately 50 women and children made use of the facility.[9]

Cumulatively, these data illustrate that spouse abuse is both a local and a national problem. The repercussions of the problem extend beyond the bounds of one family or a

single relationship. The acceptance of spouse abuse today has the potential to increase incidence rates of violence in families for successive generations. Researchers have begun to confirm the existence of a "cycle of violence." Thus, children who witness violent acts between their parents or who are the victims of parental violence often grow up to become the wife abusers and child abusers of their generation. A British study of abusive husbands revealed that over one-half the husbands had witnessed their fathers assaulting their mothers.[10] A recent report which estimated that there are one million abused and neglected children in the United States also noted that in 20% of the child abuse cases a spouse was also being assaulted.[11] Research needs to be conducted to determine more specifically the nature of violence across generations. Yet preliminary findings indicate that the justice and social services systems have an important role to play in curtailing violence in the family.

Who are the victims of spouse abuse? The best information available at the present time on the victims of spouse abuse is found in the writings of academics and professionals who are analyzing data obtained from residents of shelters. Demographic profiles indicate that victims come from varying ethnic groups and generally fall between the ages of twenty and sixty. A wide variety of educational backgrounds and religious upbringings are represented.

Psychological inventories reveal that low self-esteem, a negative self-image, a lack of self-confidence and depression are characteristics shared by many adult victims of abuse. Unstable family lives marred the childhood of many of these women.

Victims of spouse assault may have unrealistic or stereotypic expectations of themselves and their marriages. Often, they have entered the marriage expecting it to serve as a panacea for all their problems. Most of these women believe the man should be the head of the house and the major breadwinner. The balance of power in the marriage relationship is clearly weighted in the husband's favor. The social lives of these women are often directed by the husband as well.

Victims may have difficulty expressing their feelings and emotions appropriately. Yet a study comparing battered with nonbattered women found that it was the nonbattered women were more inclined to oppose someone physically or verbally. By contrast, the battered women were "more apt to submit to rules and orders even when it does not please them."[12] This finding runs counter to the belief of many uninformed people that women who are beaten by their husbands are rebellious and abusive themselves.

It should be remembered that such findings are clearly tentative and that prosecutors will encounter battered women of many different personality types.

Why do battered women stay? The question is one asked frequently by professionals who encounter victims of spouse abuse in their work. One answer is that not all of them do. Many women extricate themselves from violent relationships without seeking the help of the police or district attorney. These women often have the advantage of a strong support system of friends and family and they are not economically dependent upon their abusers.

Many battered women initially remain in the relationship because they love their mate and believe him when he says he will change. A call to the police is often a call only to have an outside authority figure stop the beatings. When the man is allowed to remain in the home, such calls may have the effect of triggering retaliatory beatings, even more severe than the initial violence.

Battered women who remain with their abusive partners over a period of time often do so because they perceive the criminal justice system as a last resort and will seek help there only in extreme desperation. Such women are likely to have no means of supporting themselves, and are highly

emotionally dependent on their husbands. Many of them live socially isolated from friends and family. Their isolation may be imposed by the abuser out of possessiveness and jealousy, or may be self-imposed from shame about visible signs of the battering.

A woman who stays experiences deep feelings of powerlessness and immobilizing fear. She may believe she has no alternatives, particularly if there are no shelters in the area or if she has met with insensitive or ineffective treatment by police or social service agencies when she has attempted to find help. Over a period of time, these feelings can lead to psychological paralysis. They can also culminate in a desperate, self-defensive homicide.

Either reaction may be grounded in a realistic assessment of the capacity of the justice and social service systems to aid her in her plight. Either may also stem from a fear of retaliation by her spouse, should her efforts to extricate herself permanently prove unsuccessful. These realities contrast with theories of early psychologists who claimed that women who stayed in violent situations were innately masochistic.

A recent study explored the manner in which feelings of powerlessness, far from being inherent in women, are created by early sex role socialization. Women are still often trained in the mode of

helplessness as a method of attracting men and male attention. As a result, even women who are well-educated and professionally ambitious may utilize traditional, deferential behavior in their relationships with men. Such women give much control and power to the men with whom they have intimate relationships. The propensity to "being a victim repeatedly is socially learned behavior."[13] The result often is that the victim justifies or rationalizes the violence by concluding either that she deserves to be beaten because she is bad or provocative, or that the abuser is not responsible because he is under stress, unemployed, alcoholic, etc.

The justice system can play a crucial role in aiding women to extricate themselves from violent relationships. Equally important is the catalyst function the justice system can have in restoring to them a sense of self-esteem and their individual value as human beings.

Who are the abusers? The sparse information available on abusive husbands indicates that they represent a wide variety of ethnic and religious backgrounds. They are of all ages and all educational backgrounds. A sample of 70 abusers revealed that "55 percent of the men were raised in families in which one or both parents were alcoholic. And, at least 63 percent either witnessed or experienced physical abuse while they were growing up."[14] Similarly, a British study of

abusive husbands revealed that 74% of them had a drinking problem and that over one half of them had witnessed their fathers assaulting their mothers.[15]

Service providers who work with adult abusers describe them as often having a negative self-image, a lack of ability to be open about their feelings, and -- in fact -- very little understanding of their true feelings. They often lack maturity and, like their mates, may have unrealistic expectations of marriage. They tend to repress anger, and they may feel oppressed by circumstance; beating their wives may give them a chance to be the oppressor rather than the oppressed.

Wifebeaters may feel guilty or ashamed of their brutality and thus may deny their behavior. Or, they may feel that their actions are justified and acceptable as a mode of controlling their wives. If this is the case, they may not feel either ashamed or guilty, and will appear mystified that the justice system considers them criminals.

Role of alcohol in abusive behavior. Historically, conventional wisdom has assumed a simple cause and effect association between violence and alcohol. Similarly, many battered women believe that their husbands' drinking causes them to be abusive, and that if they could stop them from drinking, the violent behavior would cease.

Yet recent research indicates that the relationship between alcohol and abusive behavior is considerably more complex. In many relationships, spouses may drink without ever displaying aggressive behavior. In other relationships, where no one uses alcohol, violence nevertheless occurs. In still other families, violence may occur both when the offender is drinking and when the offender is sober. Thus, the great range of individual behavior when drinking is present undercuts the notion of a cause and effect relationship between violence and alcohol.

The high incidence of intrafamily violence in situations where alcohol is present may be linked to two important functions of alcohol. Several researchers suggest that drinking may serve as a vehicle for neutralizing or disavowing inappropriate behavior displayed in hitting a family member. In order to sustain the image of one's self as normal, individuals may invoke their drunkenness to explain their behavior to <u>others</u>.

Secondly, drinkers may use the commonplace notion of alcohol causing "out of character" behavior so that they will not be held responsible for their actions in order to shift the blame for violence from themselves to the effects of alcohol. Drinkers use these tactics to deny their behavior to <u>themselves</u>. "Thus, individuals who wish to carry out violent acts [may] become intoxicated in order <u>to carry out the violent act</u>."[16]

Finally, those most closely involved with research on family violence issues cite the need for research which has the relationship of alcohol to family violence as its primary component before a full understanding of its role in spousal assault is achieved.

What methods of intervention are effective in stopping spouse assault? Social service agencies, emergency rooms, law enforcement officials and shelter staffs are experimenting with various methods of intervening in spouse assault. Because the problem is a relatively recent issue of public concern, these interventions are largely experimental. Much evaluation and analysis needs to be conducted to determine which modes are best for which cases.

The Law Enforcement Assistance Administration (LEAA) is currently working on these issues through its Family Violence Program. The Family Violence Program offers a source of funding for model programs attempting to provide innovative criminal justice interventions. The Center for Women Policy Studies is closely observing the development of these programs and should be contacted for further information.

FOOTNOTES

[1]Elaine Hilberman and Kit Munson, "Sixty Battered Women," Victimology, Vol.2, Nos.3-4 (1977-78): 469.

[2]Susan Jackson, "In Search of Equal Protection for Battered Wives," unpublished (1975) in "Fact Sheet/Wife Abuse," National Commission on the Observance of International Women's Year, U. S. Department of State, Washington, D. C.

[3]Uniform Crime Reports, U. S. Department of Justice (1975): 18.

[4]A. M. Rosenthal, Thirty-Eight Witnesses, (New York: McGraw-Hill, 1964).

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THE PROSECUTOR'S RESPONSIBILITIES IN SPOUSE ABUSE CASES

Report of the NDAA/CWPS Memphis, Tennessee, Meeting

September 25-28, 1978

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INTRODUCTION

The role of the prosecutor in spouse assault cases, as with other crimes, is limited. The police, on one end of the chronology of a case, and the court, on the other, have a hand in determining the disposition of a case. Nevertheless, it is within the discretion of the prosecutor to make decisions that will affect the quality of justice delivered in intrafamily assault cases. It is also within the purview of that office to make certain changes in administrative process which will permit spouse assault victims a choice of remedies in addition to or as alternatives to prosecution.

This is a document of the discussion which took place in Memphis among a roughly equal number of prosecutors and other persons involved in resolving violent interspousal disputes. It was acknowledged there that the state of the art in this field does not permit us to write a prescriptive report. Nevertheless, it is hoped that the ideas and opinions shared there will provide insight and guidance to persons responsible for prosecuting assaults which occur in the family.

I. HOW APPROPRIATE IS CRIMINAL PROSECUTION IN SPOUSE ASSAULT CASES?

The most serious cases of spouse assault are treated and prosecuted like stranger assaults. This means filing a charge with intent to go to trial, to obtain a conviction and to affect a punitive disposition. Beyond the most heinous cases, however, it is questionable whether most or all spouse assault cases should be treated and prosecuted in the same way as equally serious cases of physical violence between strangers. The prosecutors who participated in the conference generally agreed that spouse assault is just as criminal as violent conduct between other people and should not be treated less seriously by the criminal justice system. The conclusion was reached in spite of the fact that prosecuting more domestic violence cases will require a reallocation of the scarce resources available to prosecutors. The arguments considered in favor of and against what we will term traditional prosecution follow.

The position that traditional prosecution is not always appropriate in spouse assault cases is supported by two arguments. One is that spouse assault is primarily a personal problem that is often more effectively treated by social service methods which emphasize conflict resolution and rehabilitation. The second argument is that traditional prosecution

has been tried and has failed. It results in neither deterrence nor punishment, because uncooperative victim-witnesses who fail to appear at trial, and police officers, judges and juries who refuse to recognize the criminal nature of the acts, make prosecution, conviction and punishment impossible. It is further argued that prosecution only aggravates the conflict between the parties, escalates the violence and restricts the use of more effective alternatives.

In the absence of data to support the arguments against prosecution others urge traditional prosecution of spouse assault cases. Those who favor such prosecution view violence, whether between family members or strangers, as behavior which must not be tolerated. They believe the criminal justice system is responsible for stopping such crime, protecting citizens and helping to shape social values. They argue that prosecutors must take responsibility for improving witness cooperation and educating judges and juries to the criminal nature of spouse assault so that they can fulfill their general function of protecting all members of society from criminal activity.

The proponents of this view also disagree with the proposition stated above that traditional prosecution has been tried and proven ineffective with regard to spouse assault. Many people working on the problem feel that prosecution is rarely vigorously pursued until someone has been seriously injured

or killed. They say that the usual criminal justice system response to spouse assault is a referral to social services. Although it was agreed that very little is known about the capacity of the criminal justice system to deter crime, a strong argument was made that it can operate as effectively against spouse assault as against any other form of crime. In that regard, we know that people do not want to be punished and that they cannot hurt others if they are incarcerated.

These conclusions concerning the deterrent value of prosecution are supported by the experiences of people working with spouse abuse cases. They say that first offenders who have had no prior experience with the criminal justice system are deterred by the threat of prosecution, punishment and damage to reputation. The ones who are not deterred from future criminal activity are those who have had prior involvement with the system and who know that it often will not act upon its threats.

Some suggest that traditional criminal prosecution is even more appropriate and should be pursued more vigorously in spouse abuse cases than in other assault cases. This suggestion is based on the high rate of recidivism, the increasing severity of each repeated assault and the effect of spouse abuse on children. Strong action is necessary early in the spiral of violence to stop it effectively.

II. HOW TO DECIDE WHICH CASES TO PROSECUTE

The following considerations are suggested as relevant to a decision to prosecute a spouse assault case. There are no data to support the use of these criteria and some disagreement as to the weight to be given each in the final decision.

A. Probability of Conviction. The probability of conviction is an important consideration in any decision to prosecute. It is determined by assessing the presence of the elements of a legally sufficient case, the severity of the offense (degree of injury and number of times repeated), the attitude of the victim, the timeliness of the complaint, the defendant's prior convictions, the extent of corroboration and the circumstances precipitating the assault. Unfortunately, the probable attitudes of the judge and jury members are often considered as well. If the prosecutor predicts that they will be unsympathetic to the complainant, a decision against prosecution may follow.

Some prosecutors would make the likelihood of conviction the determining factor in deciding to prosecute. They believe that in all crimes the resources of their offices must not be wasted where acquittal is a near certainty, even though it may be the result of unexcusable ignorance or bias on the part of the jury. With respect to spouse assault cases, the

proponents of this view also feel that by prosecuting only those cases apt to result in conviction (which usually will be the most serious ones) a prosecutor can educate the court and the public to the fact that spouse assault is a crime. Winning convictions in the most serious cases will set a precedent for successful prosecution and make it possible eventually to convince juries that conviction is warranted in the less severe cases. Conversely, an acquittal confirms the public's belief that spouse assault is not a crime.

Many arguments are made against this strategy. If, as many prosecutors assert, the probability of conviction is low in spouse assault cases (there are no data to indicate whether or not this is true) this low conviction rate is likely to be based in large part on societal and judicial prejudice against these complaints rather than the actual merits of each case. Use of the conviction rate as a guide to prosecution only serves to reinforce a system that responds inappropriately to spouse assault. Prosecutors should not fail to do their job just because judges, juries and social agencies do not do theirs. If the statutory elements of a crime are present, it is the prosecutor's duty to prosecute. It is also the prosecutor's responsibility to help educate judges and juries.

Another argument against using the likelihood of acquittal due to judge and jury hostility to determine whether to file a

charge is that an opportunity for effective intervention may be missed. This is important because spouse assault is a crime that is often repeated and frequently increases in severity with each repetition. By not intervening the prosecutor is permitting the repetition to occur and will most likely see the case return to the system in a more egregious form. The act of filing a criminal complaint, even if it is eventually dismissed, may be sufficient to deter some persons from committing further criminal acts. This is known to be true especially in smaller cities and towns, where reputation is very important, and in cases involving first offenders, who have no real knowledge of the chances of conviction. Of course, this tactic should only be used where a legally sufficient case exists.

B. The Victim's Wishes. It is generally agreed that the victim should have an opportunity to articulate her goals with regard to the violent relationship and that these should be taken into consideration in the decision to prosecute. If a victim wants to end her relationship with and to punish, her attacker, prosecution may be appropriate; where the victim wants to stay with the assailant but to end the abusive behavior, another disposition may be more helpful to her. If the offense is very serious but the victim does not want

to take punitive action, a few prosecutors feel that prosecution is nevertheless necessary to fulfill their role as protectors of public safety.

The importance of acquiring an informed decision by the victim as to her intentions is to be emphasized. Not all victims who enter the criminal justice system understand how it functions, what it can do and how it affects a complainant. When they enter the system seeking protection from a police department, they may not anticipate going forward with a case. Such victims should be fully informed of the options available within and without the judicial system and given an opportunity to make their own choice of the options they wish to pursue.

C. The Likelihood of Victim Cooperation. The observation that many victims change their minds about prosecuting and drop out after a charge is filed has led prosecutors to conclude that the likelihood of victim cooperation is a critical factor in determining whether to prosecute. They feel that certain factors are valid indicators of victim cooperation. A victim is more likely to be cooperative in the following circumstances:

1. The victim has or is planning to get a divorce or separation.
2. The abuse has been very severe.
3. The children have been abused or threatened.

4. The victim has realistic expectations of the criminal justice system (delays, continuances, the trauma of trial).
5. The victim has made prior unsuccessful attempts to get help to stop the abuse and sees no other alternative to prosecution.

Other prosecutors feel very strongly that the presumption that a victim will not cooperate based on such criteria is an invalid excuse for not prosecuting. They argue that such speculation ignores the fact that some reasons for victim non-cooperation -- such as long continuances, impersonal contact with prosecutors, and the victim's lack of protection pending trial -- are failures of the system which should be corrected.

Participants also noted that the attention focused on victim noncooperation has probably spawned the existence of a "self-fulfilling prophecy" in spouse assault cases. That is, if prosecutors believe that these complainants are apt to drop charges, the prosecutors in fact become less encouraging and supportive of victims of spouse assault and, thus, subtly encourage them not to follow through with prosecution.

D. <u>The Victim's Agreement to Live Apart from the Abuser</u>. The suggestion that the prosecutor file criminal charges only in cases in which the victim intends to live apart from the abuser is the subject of much disagreement. Those who favor such a precondition to prosecution argue that it would increase

the chances of cooperation by assuring the victim greater safety. It would also enhance the chances of conviction by judges and juries who find it both amusing and frustrating to learn that the abused person still resides with the abuser.

There is strong reaction against such a requirement however, because it would be unfair to a victim who cannot leave home because she has no other place to go. It also has the effect of telling the abuser that it is acceptable to beat someone so long as you continue to live together.

A third alternative is suggested. A prosecutor could file a charge even if the victim is still living with the abuser, if the victim indicates that she wants to leave or separate. The legal system could help the victim by requiring the man to vacate the house as a condition of bond or probation or by use of injunctive relief. A similar result would then be accomplished without unnecessary stress on the victim.

E. The Availability of Alternative Programs. There is a difference of opinion concerning utilizing the availability of diversion programs as a criterion in making the decision to prosecute. One view favors consideration of alternatives because they might provide a better solution to the underlying problems. At the extreme of this view, some prosecutors believe that alternative solutions are always more effective with spouse assault cases and that one should only prosecute those that cannot be diverted.

The opposing view is that the existence of alternative programs should not affect the decision to prosecute at all. The concern is that prosecutors would, if permitted, divert all spouse abuse cases and never prosecute. It is felt that such a criterion also implies that spouse assault cases are not as serious as other cases.

F. Relationship of the Parties. It is generally agreed that the fact that the victim and assailant are spouses or friends is not an appropriate consideration in deciding whether to prosecute. If the case is one in which the prosecutor would otherwise clearly prosecute and the victim wishes to do so, the relationship between the parties is not a reason to withhold prosecution.

III. HOW TO ASSURE VICTIM COOPERATION

Although there are no data to show that victims fail to cooperate more in spouse assault cases than in stranger violence cases, it is agreed that many victims do not follow through in spouse assault cases. There is also general consensus about the reasons for lack of victim cooperation. Some of these are faults within the system, such as the failure to inform the victim about the criminal system, the long delays, the impersonal contacts with the prosecutor and the ineffective charging and sentencing of the perpetrators. Others are the

victim's fear of further injury and lack of independent housing and financial resources. These are caused by the absence of legal protection pending trial as well as the lack of interface with support services. Once it is recognized that prosecution is appropriate in spouse assault cases, it follows that prosecutors must make changes in the criminal process and make cooperative ties with support services to assure better witness cooperation.

The following measures are recommended:

1. Cases which involve serious threat of future harm should be expedited through the judicial process to reduce the chance that the victim-witness might drop out prior to trial because of the danger of further assault. Where delays and continuances are necessary the judges should be requested to admonish the abuser not to abuse or threaten the victim.
2. Some kind of victim-witness support or advocate program should be instituted in prosecutors' offices to inform victims about the criminal process, refer them to necessary support services, and assure safety and economic subsistence pending trial.
3. Special care should be taken in interviewing and handling battered spouses, because the cases involve more sensitive considerations than most other

types of cases.

4. Prosecutors should initiate training sessions to sensitize their staffs to the special characteristics of spouse assault.
5. Written material providing information about available legal and nonlegal alternatives should be furnished by the prosecutor's office.
6. Protection should be provided pending trial. Where a high risk of future injury is established prosecutors should discover and disclose to the victim what types of legal protection will be granted and enforced in their jurisdiction. For example, some jurisdictions permit bond to be conditioned on staying away from the victim or vacating the home. It is recommended that prosecutors take it upon themselves to initiate legislation which would provide adequate relief where it cannot currently be obtained.

IV. HOW TO OVERCOME PROOF AND EVIDENTIARY PROBLEMS

The evidentiary and proof issues differ among jurisdictions, but the following are problems which may arise in spouse assault cases.

A. Competency of Spouses to Testify. Some jurisdictions severley restrict the right of spouses to testify against one another. The laws differ among the fifty states, but most

jurisdictions provide an exception for victims of assaults by their spouses. The legislation should be examined in each jurisdiction and, if necessary, amended to permit spouses to testify against each other in spouse assault cases.

B. Evidence of Injury. The need to prove injury in any case involving a violent crime is a particular problem in spouse assault cases because there are usually no witnesses to the incident. Embarrassment may inhibit a victim from getting medical attention; medical records may not reflect the cause of the injury. It is important to refer victims for medical help, to obtain photographs of the injury and to subpoena medical records.

In addition, legislation requiring mandatory record keeping of spouse assault cases by hospitals and doctors with the informed consent of the victim might be considered. Such laws would increase the care taken by physicians in maintaining accurate and complete records and would also help increase the level of awareness of spouse assault within the medical profession. They would provide records which would be admissable to document abuse in cases in which doctors are unwilling or unable to testify.

V. WHAT EFFECTIVE DISPOSITIONS ARE AVAILABLE UPON PROSECUTION?

Recommending an appropriate disposition in spouse assault cases is a difficult task for a prosecutor. Judges are

reluctant to incarcerate men who are responsible for the financial support of a wife and family. The victim also may not want to have the abuser imprisoned. Yet, to be effective, the disposition must impress upon the abuser the wrongfulness of his conduct.

The following alternative modes of disposition are suggested:

1. Incarceration on weekends or nights is used in some jurisdictions, because the abuser can still hold a job and provide financial support while being punished severely enough to deter future violent conduct.
2. The offender can be put on probation with certain conditions. Staying away from the spouse and vacating the home are appropriate conditions where there is a high risk of future injury. Such risk may be measured by the extent of injury to the victim or family, the defendant's prior record of violent acts, the existence of drug, alcohol, or mental problems, and the complainant's assessment of the risk. Other conditions may include a curfew, or maintenance of employment. Financial restitution of out-of-pocket expenses may also be ordered.
3. Plea bargaining is generally thought to be as appropriate in spouse assault cases as in other personal confrontation cases. The advantages to be considered

in plea bargaining are that it may expedite the case and thus conserve scarce prosecutorial and judicial resources, may cause the abuser to admit that his acts are wrong, may allow the abuser to participate in and agree to the recommended remedy, and may spare the victim from the ordeal of court proceedings. The primary disadvantage is that the reduction of the charge may unduly depreciate the seriousness of the offense. For example, reducing a serious felony such as assault with intent to kill to assault with a dangerous weapon might be acceptable. However, reducing such crimes to misdemeanors would not. Reduction of charges is particularly inappropriate in cases involving a history of abuse, very serious injury and risk of future assault.

VI. WHAT EFFECTIVE ALTERNATIVES TO PROSECUTION ARE AVAILABLE?

Are Alternatives to Prosecution Desirable? It is generally conceded that prosecution is not the most appropriate response to all spouse abuse cases. While prosecution is necessary in certain cases, in others another form of effective intervention may be desirable.

A. Civil Remedies

Among the available civil remedies, such as divorce, suit in tort and victim compensation, it is agreed that injunctive

relief is the only one which has the potential for providing both protection to the victim and deterrence to the abuser. This relief consists of protective orders which may mandate that the assailant stay away from the victim, and vacate the home. An injunction may also order counseling and determine child custody and visitation. Preliminary injunctions, which generally are issued upon application of the victim and after a hearing at which the victim must show threatened or actual harm, are available to afford emergency relief. Most jurisdictions provide enforcement through civil or criminal contempt proceedings.

If made available and enforced, these orders might provide effective relief to battered spouses. However, the experience of most jurisdictions is that the orders are not enforced and therefore neither deter abusers nor protect victims. Instead, they reinforce the widespread attitude that battering of one's spouse is acceptable behavior and will not be punished by the legal system.

One barrier to the effectiveness of protective orders is the failure of police officers to arrest for violation of the order. The failure to arrest is partially based on statutory requirements which permit arrest only when the violent acts are committed in the presence of the officer or upon a previously issued warrant, both of which rarely occur in spouse assault cases.

A response to the problem is legislation which authorizes warrantless arrest for violation of an order if there is probable cause, regardless of the presence of an officer. While there is yet no study fully evaluating the effectiveness of such legislation, reports from Pennsylvania indicate that officers appreciate the clear authority to arrest and have begun to do so for violation of protective orders. In some jurisdictions, the broader usage of citizen's arrest by way of a victim's complaint signed on the spot might suffice.

Judges also contribute to the ineffectiveness of civil orders. They are often reluctant to issue orders of protection or to enforce them by punishing the violator with contempt citations and sentences, because of the familial nature of the crime and the economic dependence of the abused on the abuser. Education and pressure on the judiciary are needed to make protective orders available and enforceable.

The conference participants agreed that prosecutors should take a public position in favor of improving the effectiveness of protective orders, in order both to provide an effective remedy and to reduce pressure on the criminal system. The participants endorsed the following suggestions as specific ways to improve the effectiveness of protective orders:

1. Prosecutors should take an active role in educating judges to the problem of spouse abuse and to the need for protective orders.
2. Greater access to legal services by battered spouses is needed.

3. Orders of protection and access to court should be available regardless of income.
4. Orders should not be conditioned upon divorce or separation.
5. Orders should be available 24 hours a day, 7 days a week.
6. Orders should be clear and specific. They should be available in bilingual form where appropriate.
7. Orders should be available ex parte for immediate emergency relief.
8. A hearing should be held in 24 to 72 hours after issuance of an ex parte order.
9. The order should be served on the offending spouse by an authority figure, such as a marshall or police officer, and not by the victim or a neighbor.
10. Where not already available, legislation should be initiated authorizing police officers upon probable cause, to make a warrantless arrest for violation of an order and providing for police immunity for false arrest.
11. Similarly, legislation may be needed to allow for an order of eviction of the abuser from the home, regardless of property rights.
12. A registry of orders of protection should be kept at the police station for the following purposes:

a. to provide police with evidence that the order was issued.

b. to provide prosecutors and judges in certain cases with evidence that orders of protection have been previously issued and violated and that prosecution is appropriate.

c. to provide statistics as evidence of the effectiveness of such relief.

B. Dispute Resolution

Dispute resolution is not a new response to spouse abuse, but its past application has been limited to informal conciliation efforts by police officers and prosecutors and is generally thought of as ineffective. Mediation and/or arbitration are other forms of dispute resolution which are more structured responses to spouse assault, but whose effectiveness has not yet been evaluated. Mediation requires a third party to help the disputing parties work out a resolution to their problem, while arbitration requires the third party to impose a settlement on the disputing parties. It is generally agreed that people are more likely to adhere to an agreement which they themselves drew up, and therefore mediation is a more appropriate response to spouse assault. Mediation is not seen as a panacea to the problem of spouse assault, but a resolution that may be effective in certain instances.

1. When Is Mediation Appropriate? There is general agreement that mediation can only be effective if the parties voluntarily agree to participate. In order to be truly voluntary, agreement must be given with full knowledge of the nature of the process, the possible results and the alternatives. It is also accepted that mediation is particularly appropriate where the parties envision a continuing relationship and must establish agreement as to how to relate in a non-violent manner.

Certain factors are considered as indicators that mediation would probably not be effective. It is generally agreed that mediation would be less appropriate for more severe offenses, but there are divergent views as to whether all felonies should be excluded from the mediation process or whether prosecutors should retain discretion with a bias against mediation. A long history of battering is another indicator that mediation would be ineffective. It was felt, however, that mediation could still be useful if desired by both parties, although there has been violence between the couple for years.

2. How Does the Mediation Process Differ from the Criminal Process? The criminal process seeks to make a determination of guilt or innocence as to particular criminal acts and does not attempt to resolve the underlying problem between the parties. Mediation, on the other hand, does not require a finding of guilt or fault, and the parties attempt to reach an agreement to insure that certain conduct will not recur.

There is strong feeling that spouse assault cases cannot be resolved without an admission of fault by the abuser. Those who would require an admission of fault are concerned that the abuser will never realize the wrongfulness of his acts and will continue to abuse his spouse if not required to make such a statement. They feel that a pledge to stop the violence must precede the bargaining session. Otherwise, the dominant/submissive nature of their relationship could lead to the already abused spouse having to bargain for physical safety to which she has a legal right.

Persons trained in mediation argue that one of their duties is to equalize the power position of the parties in the mediation process. They often do this in disputes between employers and employees, and between landlords and tenants, for example. Furthermore, when a case is diverted from a prosecutor's office, the defendant's power position vis a vis his wife is apt to be neutralized by the fact that he is subject to prosecution.

3. What is the Responsibility of the Prosecutor Upon Breakdown of Mediation or Violation of One of the Terms of the Mediation Agreement? Follow-up and evaluation are important aspects of any mediation process. It is felt that a periodic follow-up for one year after the agreement is reached is fundamental to compliance. Thereis disagreement, however, as to the prosecutor's role in the follow-up. Many believe that the prosecutor should retain jurisdiction over the case for up to

a year and prosecute upon failure to mediate or a recurrance of the violence.

There is some concern that prosecutors will be accused of holding criminal prosecution over a person's head to achieve a favorable settlement of private rights such as child custody, visitation and other questions which may be incorporated in the mediation agreement. Those favoring retention of jurisdiction feel that this is not a valid concern because prosecutors would only reenter the case if another assault occured. Other provisions could be enforced as a contract by a civil court. It was generally agreed that the threat of prosecution was otherwise positive and permissible leverage to use in having the parties reach an agreement as to how they will resolve the abuse problem.

C. Social Services

It is recognized that social services and community agencies provide housing, financial and counseling services which are necessary to the battered victim and which the legal system cannot provide. It is therefore the prosecutor's responsibility to investigate the existence of resources available in the community, and to develop a cooperative relationship with, as well as a referral process to, such resources. The prosecution can also be an advocate and catalyst for development of social services to support victims of domestic abuse.

CONCLUSION

The prosecutors attending the conference endorsed the premise of the LEAA Family Violence Program that spouse abuse is a crime and that prosecutors have the same responsibility to respond effectively to spouse abuse cases as they have with other crimes. Their general responsibility encompasses responding to the immediate needs of the individual victims as well as pursuing long-range strategies to prevent and control crime. Both goals are furthered by the development of a comprehensive approach which integrates traditional prosecution of individual cases with public education, support services and links to community resources.

Spouse abuse cases have always posed problems because prosecutors are typically faced with a large number of cases and have limited resources. Spouse abuse cases are also difficult to prosecute because victim-witnesses, vulnerable to attack pending trial and lacking support services, often drop out before trial. There are rarely other witnesses to such assaults, and medical proof of injuries may not be available. Judges and juries, insensitive to the crime and concerned about the familial nature of the offense, often refuse to convict. Support services and alternatives to prosecution for victims may be unavailable or ineffective. As

a result, refusal to prosecute such cases has been the traditional response.

Prosecutors are becoming more aware of the extent and severity of spouse abuse and the consequent need for an effective legal response to the problem. There is also increased understanding of the factors which have traditionally made prosecution difficult. For example, knowledge that witness noncooperation is often caused by low self-esteem, embarassment, economic dependence, fear of retaliation and lack of alternative housing points to the need for victim services. Similarly the attitude of the legal system that spouse abuse is not a crime but a family matter is subject to change through education. In their search for answers, some prosecutors are experimenting with new forms of victim support services, alternatives to prosecution such as mediation, and social service referral systems. The experiments are still new, few in number and largely unevaluated.

SPOUSE ASSAULT IN THE LEGAL SYSTEM
SELECTED READINGS

Center for Women Policy Studies
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202/872-1770

Julie Paradis
Charlotte Germane
Judy Cohart

I. SOCIO/LEGAL PERSPECTIVES

Michigan Women's Commission. Domestic Assault: A Report On Family Violence in Michigan. Lansing: State of Michigan, 1977.

Thorough analysis of the causes of spouse abuse. Discusses both legal and nonlegal assistance and concludes with recommendations which would provide greater legal and social support for victims. Appendix lists resource agencies and organizations in Michigan.

Straus, Murray A. "Sexual Inequality, Cultural Norms, and Wife-Beating." Women Into Wives: The Legal and Economic Impact of Marriage, ed. Jane R. Chapman and Margaret Gates (Beverly Hills: Sage Publications, 1977): 59-77: Also in Victimology (Spring 1976): 54-67

A sociological study which focuses on the ways in which spouse abuse is "sanctioned" by the culture. Examines social acceptance of intrafamily violence, the legitimization of husband-wife violence by court and police, and the effects of sex role stereotypes.

II. CRIMINAL AND CIVIL COURTS

Eisenberg, Sue E. and Micklow, Patricia L. "The Assaulted Wife: 'Catch 22' Revisited." Women's Rights Law Reporter 3, No. 3-4 (Spring-Summer 1977): 138-161.

Comprehensive article examining societal responses to battered women. Looks at the history of attitudes and present institutional methods, in particular those of the Michigan legal system, for coping with the problem. Changes in procedure are suggested.

Field, Martha and Field, Henry. "Marital Violence and the Criminal Process: Neither Justice Nor Peace." Social Service Review 42 (2) (June 1973): 221-240.

Concise discussion of the limited response of police, prosecutors and courts to family violence. Civil alternatives are suggested.

Fields, Marjory. "Representing Battered Wives, or What to do Until the Police Arrive." Family Law Reporter 3, No. 22, (1977): Monograph No. 25.

By a legal services attorney who describes the options available to the battered wife, what she can expect from the courts, how to interview battered women, problems of protecting the client from further attacks and enforcing a favorable judgement.

Freeman, Michael. "Le Vice Anglais - Wife-Battering in English and American Law." Family Law Quarterly 1 (Fall 1977): 199-251.

Overview of both sociological and legal literature and also civil and criminal remedies with regard to spouse abuse. Comparison of English and American law widens the scope of the discussion.

Fromson, Terry. "The Case for Legal Remedies for Abused Women." New York University Review of Law and Social Change 6 (Spring 1977): 135-174.

Gives statistical evidence of women's low economic status and links it to their vulnerability to abuse. Sees both prosecution and conjunctive relief as generally ineffective. Suggests tort damages or divorce (in conjunction with immediate protection) as a solution. Reforms recommended include better understanding of the problem by prosecutors, and legislative changes.

Parnas, Raymond I. "Judicial Response to Intrafamily Violence." Minnesota Law Review 54 (1970): 585-644.

Provides numerous examples in comparing the practices used by Chicago, Detroit, Milwaukee, and New York court systems in response to intrafamily violence. Recommends strong societal assistance beyond the legal remedies.

Parnas, Raymond I. "Prosecutorial and Judicial Handling of Family Violence." Criminal Law Bulletin 9 (1973): 733-68.

Develops earlier discussion (see above) of judicial response to spouse abuse. Includes description of experimental community-based programs in Philadelphia and Washington, D.C. Recommends alternatives to criminal treatment of the problem.

Schickling, Barbara M. "Relief for Victims of Intra-Family Assault - The Pennsylvania Protection from Abuse Act." Dickinson Law Review Volume 81, No. 4 (1977): 815-822.

Examines the scope of relief provided by the Pennsylvania Protection from Abuse Act (1976). Comparisons made with New York and Massachusetts legislation.

Younger, Evelle J. Handbook On Domestic Violence. California Department of Justice, Office of The Attorney General; 1978.

Step-by-step description of legal remedies and social services available to victims of spouse abuse in California. The handbook contains names of people and places that can be contacted, as well as an extensive bibliography.

III. FAMILY COURT

Coon, Judge Liston F. "Felony Assaults in Family Court." Criminal Law Bulletin (May 1965): 11-14.

Discussion of whether Family Court is an appropriate (and constitutional) forum for a felonious assault case under New York law at the time the article was written.

Note. "Orders of Protection in Family Court Disputes." Columbia Journal of Law and Social Problems 2 (1966): 164-175.

Discussion of the effectiveness of protective orders as a deterrent to family violence based on the New York Family Court experience in the mid 60's.

IV. MEDIATION/ARBITRATION

Fuller, Lon. "Mediation: Its Forms and Functions." Southern California Law Review 44 (1971): 305-339.

Theoretical discussion of the use of mediation for solving problems in the social order. Sees it as useful in resolving family disputes. Does not discuss cases of physical violence.

Laszlo, Anna and McKean, Thomas. "Court Diversion: An Alternative for Spousal Abuse Cases." Paper presented to U.S. Commission on Civil Rights Consultation: "Battered Women: Issues in Public Policy." Washington, D.C., January 30-31, 1978.

Analyzes 86 spouse abuse cases that were processed through the mediation component of the Urban Court Program, Boston, Massachusetts. Fifty-six percent reached a settlement through operating mediation. Describes similar programs around the country and sets out guidelines for developing new ones.

McGillis, Daniel and Mullen, Joan. Neighborhood Justice Centers: An Analysis of Potential Models. Washington, D.C.: Law Enforcement Assistance Administration, 1977.

In-depth discussion of the possible uses of mediation in neighborhood justice centers. Compares the operations of six on-going programs. Minimal consideration of family disputes.

Sander, Frank. "Varieties of Disputes Processing." Federal Rules Decisions 70 (1976): 111-133.

Discusses dispute resolution outside the criminal system and outlines possible criteria to be used to determine which procedure is most appropriate for each type of case.

Stulberg, Joseph B. "A Civil Alternative to Criminal Prosecution." Albany Law Review 39 (1975): 359-376.

An advocate of mediation describes the advantages of this process in solving minor disputes, providing specific examples. The article does not specifically discuss the problem of spouse abuse.

U.S. GOVERNMENT PRINTING OFFICE : 1980 O-311-375/1519